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No. 350

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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

October Term, 1950

TOMAS ESQUIVEL, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 260

JOHN BRUSZEWSKI, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 88 F. Supp. 962. The opinion of the Court of Appeals for the Third Circuit is reported at 181 F. 2d 419.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1950. A petition for rehear-

[1] No record references are available since petitioner has filed the record in typewritten form without any continuous pagination.

ing was denied on May 24, 1950. The petition for a writ of certiorari was filed on August 22, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, after a full and complete trial where judgment on the merits is entered against the plaintiff and in favor of the defendant, that same plaintiff may relitigate the identical issues of liability on the same set of facts in another suit against a second defendant who was under an obligation to indemnify the first defendant for any damages which the plaintiff might have recovered in his first action.

2. Whether the warranty of seaworthiness applies to make a shipowner absolutely liable for personal injuries sustained by an employee of an independent contractor from a broken boom which he was engaged to remove.

STATUTE INVOLVED

Section 2 of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741) is set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

In November 1943, the *S. S. George Read*, a vessel owned and operated by the United States and husbanded by the Isthmian Steamship Company pursuant to a General Agency Agreement, was docked at a pier in Philadelphia. The United

States contracted with the B. H. Sobelman Company, a stevedoring contractor, for the loading of the vessel. On November 9, 1943, while the vessel was being loaded by stevedores employed by the Sobelman Company, a boom on the vessel was broken. The superintendent of stevedores for the Sobelman Company procured a gang of men to remove and repair the broken boom. Petitioner was one of the gang who reported on the vessel for that job, which was the only job he, with the rest of the gang, were called upon to do. *Bruszewski v. Isthmian S. S. Co.*, 66 F. Supp. 210, 213. As the broken boom was being raised for the purpose of removing it, petitioner walked across the deck underneath the boom and was struck on the head by a block which had come loose from the ropes by which it was attached to the boom. *Bruszewski v. Isthmian S. S. Co.*, 66 F. Supp. 210, 211; *Bruszewski v. U. S. War Shipping Administration*, 88 F. Supp. 962, 963.

For the injuries so sustained, petitioner, on March 6, 1944, filed a civil action against Isthmian in the United States District Court for the Eastern District of Pennsylvania alleging negligence and unseaworthiness of the vessel. Isthmian denied ownership and control of the vessel and denied generally all of the allegations concerning its negligence and the unseaworthiness of the vessel. After all the evidence was in, the district court decided that there was no evidence of negligence on the part of Isthmian as owner *pro hac vice* and

that the work in which petitioner was engaged was not a maritime service and therefore not covered by the warranty of seaworthiness. See 66 F. Supp. 210, 213. He accordingly directed the jury to return a verdict for Isthmian. The Court of Appeals for the Third Circuit affirmed on the same grounds, holding that there had been a failure to prove negligence and that the doctrine of unseaworthiness was non-applicable. These holdings, that court pointed out, made it "unnecessary for us to pass upon the contentions that the warranty of unseaworthiness cannot be asserted against a general agent". 163 F. 2d 720, 722. Certiorari was denied by this Court on February 2, 1948. 333 U. S. 828.

Meanwhile, on June 28, 1945, shortly after the trial court had directed the verdict in favor of Isthmian, petitioner brought the instant libel against the United States. Petitioner again based his claim for damages for his personal injuries on negligence and unseaworthiness of the vessel.[2] The United States filed a general denial. In addition, it filed a motion to dismiss on the ground that the prior adjudication in favor of Isthmian, its General Agent, bars this subsequent suit against the United States. This motion was, by agreement

[2] Comparisons of paragraphs 4 through 8 of the complaint filed against Isthmian, and paragraphs 4 through 8 of the libel filed against the United States, show that these operative portions of the complaint and libel are identical. (See pp. 1-3 of the complaint in the *Isthmian* record and pp. 3-6 of the libel against the United States).

of the court and counsel, heard on the entire record in the *Isthmian* case, and was granted by the district court. It ruled that in the prior civil action petitioner had failed to prove that the General Agent was negligent and that a judgment had been entered against petitioner on the merits on that aspect of the case. With respect to the issue of seaworthiness, the court pointed out that the United States had not warranted the seaworthiness of the defective boom and its tackle as to this particular plaintiff, and that the case of *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 is therefore inapplicable. 88 F. Supp. at 964. The court below affirmed, holding that in the present case the very party "against whom the first judgment was rendered [*i.e.*, petitioner] is to be bound in the subsequent action." Both the majority and concurring opinions found the relationships between the United States and the Isthmian Steamship Company sufficient to warrant application of *res judicata* against the same claimant who had twice asserted essentially the same claim against the two different defendants.

ARGUMENT

Petitioner, while recognizing the underlying purpose of *res judicata*—to put an end to litigation where the issues have already been fully contested and decided—advances an alleged lack of identity of parties and of cause of action as justification for non-applicability of that doctrine here. His other

argument is that the warranty of seaworthiness extends not only to longshoremen engaged in loading or unloading services but also to those removing and repairing broken machinery on a docked ship. The decisions of the two courts below rejected both contentions. Since those decisions are sound and present no conflict, we submit that review here by writ of certiorari is unwarranted.

1. After a party has had his day in court, with full opportunity to present his evidence and his view of the law, the rule of *res judicata* precludes renewal of that litigation in another court. *Stoll v. Gottlieb*, 305 U. S. 165, 172; *Heiser* v. *Woodruff*, 327 U. S. 726, 733. The rule is based on the obvious need for conserving judicial time for other litigants and on the desirability of establishing certainty in legal relations. *Commissioner* v. *Sunnen*, 333 U. S. 591, 597; *Angel v. Bullington*, 330 U. S. 183, 185.

a. Although both considerations underlying the rule obviously apply here, it is urged that the rule nevertheless is inapplicable because petitioner named Isthmian as defendant in the first suit and named the United States in the second. But, as this Court has consistently ruled, "where the issues in separate suits are the same, the fact that the parties are not precisely identical" does not justify a departure from the rule. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 402; *Chicago, R. I. & P. Ry.* v. *Schendel*, 270 U. S. 611; *Heiser* v. *Woodruff*, 327 U. S. 726.

This is especially true in situations where the defendants, while not identical, have the relationship of principal and agent, master and servant, and, as here, "indemnitor and indemnitee." *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 128.[3] It is well established that a judgment against an indemnitee, who has a right of action over against the indemnitor, is conclusive upon the latter. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 330; *Lovejoy* v. *Murray*, 3 Wall. 1, 18; *Rust Land & Lumber Co.* v. *Wheeler*, 189 Fed. 321, 326; *Oceanic Steamship Co.* v. *Compania Transatlantica Espanola*, 144 N.Y. 663, 665; *Brobston* v. *Darby Borough*, 290 Pa. 331, 341. Similarly, where the indemnitee successfully defends an action and is awarded a judgment on the merits against the

[3] No different result is contemplated by any of the language of the *Bigelow* case relied on by petitioner (Pet. 13). The opinion in that case shows that a plea of *res judicata* will not be allowed against the plaintiff where the defenses available to the first defendant were not available to the defendant in the second action instituted by the same plaintiff. 225 U.S. 111, 128. Likewise, where the second defendant's rights are different from those presented in the first action by the first defendant, the second defendant cannot be estopped by *res judicata* but is entitled to be heard on the defenses peculiar to him. Nothing further is involved in the other two cases cited by petitioner on this aspect of the case. *Hartford Accident Co.* v. *Nelson Co.*, 291 U.S. 352, 357 and *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 438-439. In the instant case, however, there is no doubt that the rights asserted by petitioner, against whom *res judicata* is here invoked, are identical in both actions. See p. 10, *infra*. And there also is no doubt that Isthmian, the defendant in the first action, did not obtain a judgment on any personal grounds. To the contrary, all of its defenses to petitioner's negligence and unseaworthiness claims would have been fully available to the United States.

plaintiff, that judgment constitutes a complete defense to any action later brought by the plaintiff against the indemnitor. See *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 128; *Elder* v. *N.Y. & Penn. Motor Exp.*, 284 N.Y. 350, 352; *Anderson* v. *Fleming*, 160 Ind. 597.

The existence of an indemnity relationship between Isthmian and the United States cannot be denied. In his libel in the instant case, petitioner alleged that Isthmian operated the "George Read" under a General Agency Agreement with the United States. Article 8 of the General Agency Agreement provides that the United States "shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of" risks and liabilities incurred in the course of operation of the vessel. 46 C.F.R. 306.44, Art. 8.[4] Hence, if petitioner had recovered damages from Isthmian in the first action, the United States would have been required to indemnify Isthmian. This indemnity relationship, apart from all other considerations, makes it apparent that the courts below properly allowed the United States to take advantage of the prior judgment rendered in favor of its indemnitee.

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[4] This Agreement was attached to defendant's answer in the *Isthmian* case, the record of which, as petitioner points out, has been included in the instant case (Pet. 6, note 3). However, since the Agreement has not been reproduced in the typewritten record now before the court, the Code of Federal Regulations citation, rather than a record reference, is used in the text.

Moreover, even in the absence of such a relationship, it seems clear that the circumstance of this case fully warranted application of the rule of *res judicata*. It must be noted that here no attempt was made to invoke an initial judgment against a subsequent defendant who did not appear in the first action and who did not have any opportunity to be heard or to contest the case. Due process would, of course, preclude application of the rule in such a situation. However, the rule, far from being invoked by a plaintiff who has appeared in a prior action against a defendant who has had no opportunity to participate in that prior action, is, in the instant case, invoked by a non-appearing defendant in the second action (*Bruszewski* v. *United States*) against the plaintiff who did appear in the first action (*Bruszewski* v. *Isthmian*), who did have a full opportunity there to litigate the very issues presented for adjudication in the second action, and who, in short, has had his day in court. Under these circumstances, the courts have regularly refused to allow such a plaintiff, who lost on a full and fair trial of the issues, "to reopen identical issues by merely switching adversaries." *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 813; *Coca Cola Company* v. *Pepsi-Cola Company*, 6 W. W. Harr. (Del.) 124; [5] *Cohen* v. *Superior Oil Corp.*,

[5] Despite the fact that these cases were cited in the decision below, it is significant that petitioner has not challenged their reasoning nor attempted to demonstrate their lack of applicability.

16 F. Supp. 221, 225 (D. Del.), affirmed, 90 F. 2d 810 (C. A. 3), certiorari denied, 302 U. S. 726. See *Taylor* v. *Sartorious*, 130 Mo. App. 23, 40; *City of Richmond* v. *Davis*, 135 Va. 319; 9 Va. Law Reg. (N.S.) 241

b. That petitioner's libel in the instant case exhibits the identical cause of action which was set forth in petitioner's former complaint against Isthmian is not open to question. Both the libel and complaint set forth, *in hacc verba*, the same six alleged acts of negligence and unseaworthiness (See paragraph 7 of the libel in the instant case and paragraph 7 of the complaint in the *Isthmian* case). All other pertinent paragraphs of the libel and complaint are identical and set forth in the same phraseology, the circumstances surrounding petitioner's personal injuries on November 9, 1943, and the extent of those injuries (Cf. paragraphs 4, 5, 6 and 8 of the libel with the same paragraphs of the complaint). The relief asked for those injuries is the same—$25,000 in each case. In short, the right petitioner seeks to enforce in each of the two actions is precisely the same—*i. e.*, the right to be compensated for the injuries he sustained on November 9, 1943.

The identity of the object of both suits, of the claims asserted, of the issues raised, and of the relief asked, makes it apparent that the cause of action in each case is the same and that therefore the judgment in the action against Isthmian bars the instant suit. *Case* v. *Beauregard*, 101 U. S. 688;

Chicago, R. I. & P. Ry. v. *Schendel*, 270 U. S. 611. Petitioner's only argument to the contrary is that the judgment in favor of Isthmian may not bar the second action because that first judgment, had it been in favor of petitioner, would have been set aside because of the considerations stated in the later decision of this Court in *Cosmopolitan Co.* v. *McAllister*, 337 U. S. 783. How this Court's holding in that subsequent case to the effect that a General Agent is not liable to a seaman for injury caused by the vessel's master or crew transforms petitioner's action for personal injuries into some other type of action is difficult to perceive. In any event, the short answer to petitioner's argument is that the court of appeals disposed of the *Isthmian* case on the grounds of no negligence and no unseaworthiness and not on any ground pertaining to the liability or non-liability of a General Agent as such. Hence, the court did not even reach the question later decided in the *Cosmopolitan* case. Furthermore, even if the court had reached that question in the *Isthmian* case and decided it incorrectly, it would still be *res judicata* and a bar to plaintiff in his second action. *Case* v. *Beauregard*, 101 U. S. 688, 692. As has been pointed out in a situation on all fours with the instant case, "even if the former judgment were clearly erroneous the bar would nevertheless be effevtive. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591." *Brailas* v. *United States*, 79 F. Supp. 963 (S.D.N.Y.).

2. Petitioner's other contention is addressed to the very question he presented to this Court when the *Isthmian* case was here on petition for certiorari, *i. e.*, whether the warranty of seaworthiness applies to make a shipowner absolutely liable for personal injuries sustained by an employee of an independent contractor from a broken boom which he was engaged to remove. (*Bruszewski* v. *Isthmian Steamship Co.*, No. 475, Oct. T. 1947, certiorari denied, 333 U. S. 828). Indeed, the Petition for Certiorari, filed by petitioner in that case, advances the identical argument he sets forth in the instant Petition. (Cf. pp. 36-45 of petitioner's Isthmian Petition with pp. 18-28 of the instant Petition).

Re-examination of the question is not warranted. Petitioner relies heavily on *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, which extended the warranty of seaworthiness to longshoremen engaged in loading and unloading. That case had been decided before certiorari was denied in petitioner's prior case and since then courts have not felt that the doctrine should be further extended to cover persons engaged to perform repairs. *Guerrini* v. *United States*, 167 F. 2d 352 (C. A. 2), certiorari denied, 335 U. S. 843; *Armento* v. *United States*, 74 F. Supp. 198 (E. D. N. Y.).

Moreover, regardless of the general applicability of the doctrine to longshoremen engaged to make repairs, there is no justification for implying such

a warranty in a case like the present involving persons injured by reason of the very defect they were hired to repair. The courts below pointed out the absurdity of implying that the owner warrants the seaworthiness of parts of a vessel to persons called in to make those very parts seaworthy. *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 587 (C. A. 2); *Armento* v. *United States*, *supra*.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1950.

APPENDIX

Section 2 of the Suits in Admiralty Act (Act of March 9, 1920, as amended, 41 Stat. 525, 47 Stat. 420, 46 U. S. C. 741, *et seq.*) provides as follows:

> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if

the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court in the United States.

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